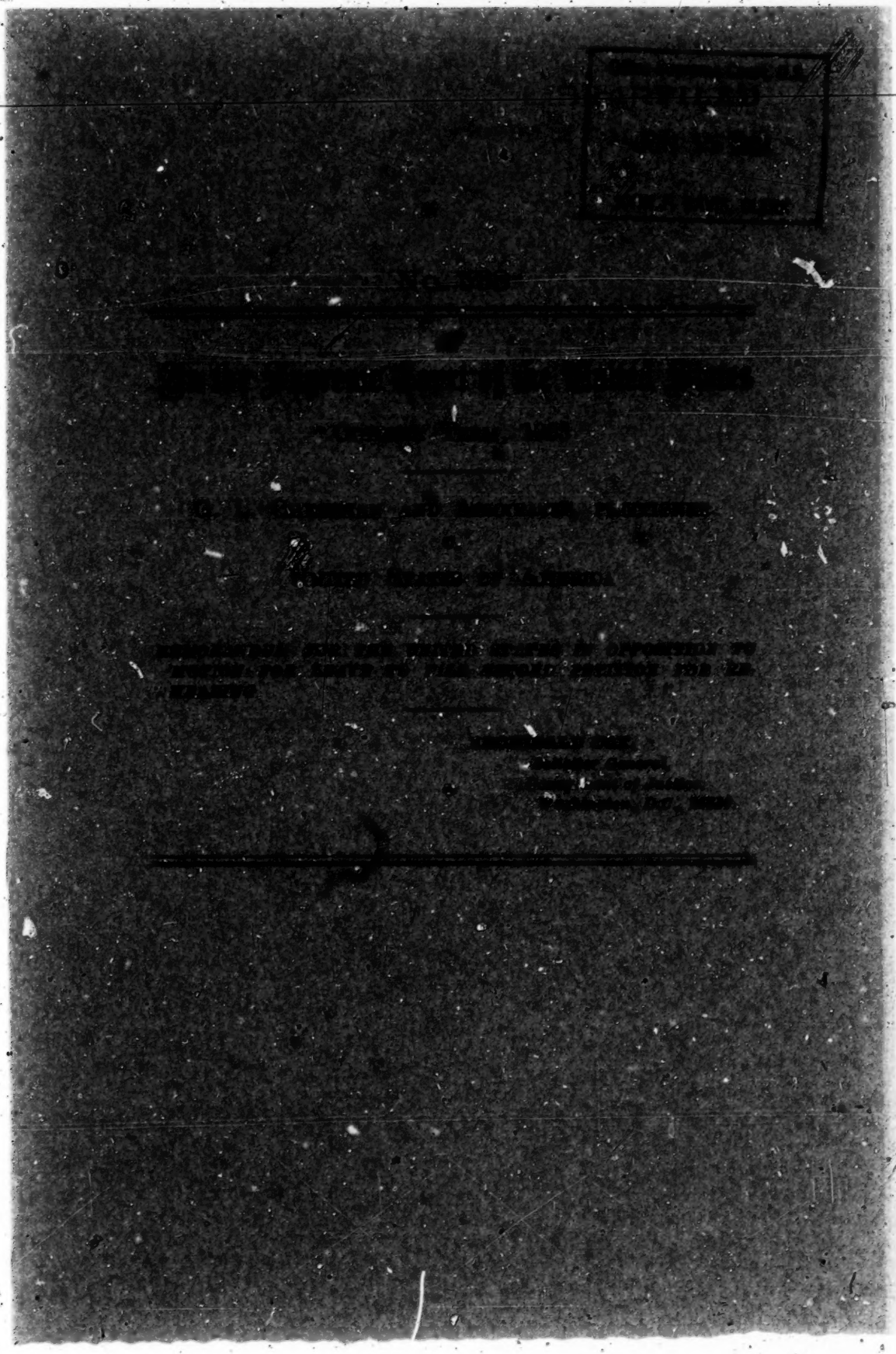

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 538

G. L. CHRISTIAN AND ASSOCIATES, PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING

Petitioner's present motion alleges that the decision of the Court of Claims on which review is sought conflicts with *Murray* v. *Washington*, 384 P. 2d 337 (Sup. Ct. Wash., August 1, 1963), appeal pending, No. 851, this Term.[1] We submit that there is no conflict between these decisions and that the present motion should in any event be denied by reason of untimeliness.

In *Murray* v. *Washington*, *supra*, and its companion cases, it was held that the State of Washington could

[1] Decided by the Supreme Court of Washington in the same opinion, and also pending before this Court, are *Inland Empire Builders, Inc., et al.* v. *Washington*, No. 849, and *Herb and Varodick, et al.* v. *Washington*, No. 850. Pursuant to an order of this Court dated May 4, 1964, the Solicitor General has filed a memorandum in these cases expressing the view that probable jurisdiction should be noted.

734-492—64

assess a retail sales tax against a construction contractor in a Capehart Act project, on the ground that the contractor should have collected the tax from the mortgagor-builder, which is the corporation whose function it is to lease the construction site from the United States and to pay the contractor out of the proceeds of an FHA-guaranteed mortgage loan. The court ruled that (1) the mortgagor-builder, rather than the United States, was the "buyer" on whom the State statute imposed the tax, and (2) the mortgagor-builder was not a federal instrumentality for purposes of immunity from State taxation.

One of the issues in the present case is whether Section VIII of the Armed Forces Procurement Regulations, 32 C.F.R. Part VIII, applied to Capehart Act housing contracts. These Regulations govern "contracts made by the Department of Defense * * * for the procurement of supplies * * * which obligate appropriated funds." The only issue argued by petitioner with respect to the applicability of this language was whether the housing contract could be deemed to "obligate appropriated funds." (Pet. 21–24.) The Court of Claims held that the contract did "obligate appropriated funds," because of the FHA guaranty and the contingent obligation of the United States to assume the mortgage. This holding as to the meaning of the regulations has no bearing whatever on the two grounds of decision in the *Murray* case. For the construction of the words "obligate appropriated funds" obviously has nothing to do with the meaning of the word "buyer" in the Washington tax statute; nor is it relevant to the

question whether the mortgagor-builder is a federal instrumentality for purposes of immunity from State taxation.

Moreover, the decision of the Supreme Court of Washington was rendered on August 1, 1963, well before the filing of the petition for a writ of certiorari in this case on October 10, 1963. Petitioner's sole excuse for the delay to date is that the Jurisdictional Statement in *Murray* was not filed until February 15, 1964, almost four months ago. Even if there were a conflict in decisions—which there clearly is not—this justification would be inadequate, particularly since the same alleged conflict existed when the petition for certiorari in this case was filed. As petitioner notes, *S. S. Silberblatt, Inc.* v. *Tax Comm'r*, 5 N.Y. 2d 635, 159 N.E. 2d 195 (1959), certiorari denied, 361 U.S. 912, also involved the question of whether a State tax could be imposed on the mortgagor-builder of a Capehart Act project.

For the foregoing reasons, petitioner's motion should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JUNE 1964.

U.S. GOVERNMENT PRINTING OFFICE 1964